

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
October 15, 2003 Session

**JAMES ROBERT ELROD v. DEBORAH M. ELROD**

**Appeal from the General Sessions Court for Loudon County  
No. 8191 William H. Russell, Judge**

**FILED JANUARY 15, 2004**

**No. E2003-00252-COA-R3-CV**

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James Robert Elrod (“Husband”), sued for a divorce from Deborah M. Elrod (“Wife”). Husband was granted a divorce based on Wife’s inappropriate marital conduct. Husband was designated the primary residential parent for the parties’ minor son. The Trial Court then divided the marital assets and awarded Wife unclassified alimony in the amount of \$1,000 per month for twelve months. Wife appeals, claiming the distribution of the marital assets was inequitable and that she was entitled to permanent alimony or, at a minimum, alimony for a longer period of time. We affirm the distribution of the marital assets as modified herein and further conclude that Wife is entitled to rehabilitative alimony in the amount of \$1,000 per month for a period of sixty months.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the General  
Sessions Court Affirmed as Modified; Case Remanded.**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, J., and WILLIAM H. INMAN, SR. J., joined.

Adam M. Priest, Knoxville, Tennessee, for the Appellant Deborah M. Elrod.

Jerrold L. Becker and Lori F. Fleishman, Knoxville, Tennessee, for the Appellee James Robert Elrod.

## **OPINION**

### **Background**

This case began when Husband filed a Complaint for Divorce in the General Sessions Court for Loudon County. When the complaint was filed, the parties had been married almost twenty years and had three children, only one of whom was a minor when the divorce was granted. After a trial, Husband was granted a divorce from Wife on the grounds of inappropriate marital conduct. Husband was designated the primary residential parent of the parties' eleven year old son. Wife does not appeal either of these rulings. The issues on appeal center solely around the Trial Court's division of marital assets and award of alimony. We will, therefore, discuss only those facts relevant to these issues on appeal.

Husband was 51 years old at the time of trial. Husband is a practicing dentist and has been licensed to practice since 1976. The parties' income was primarily Husband's earnings from his dental practice, and for the years 1996 through 2000 averaged \$184,085 per year. During the marriage, Husband paid all of the primary bills such as mortgages, car payments, utilities, and the like. Husband testified that Wife worked from time to time at his dental practice. According to Husband, he wanted Wife to do whatever made her feel good about herself, regardless of whether that "was working or if that was staying home." The parties separated after Wife assaulted their oldest son with a flashlight and was taken to jail. Husband filed an affidavit of income and expenses which showed average monthly income of \$6,262.08 and average monthly expenses of \$8,388.26. Notwithstanding the fact that his affidavit shows a deficit of over \$2,100 per month, Husband testified he was not "running in the hole every month." Some of the monthly bills listed on Husband's affidavit included: telephone - \$250; food and taking all three children out to eat - \$1,400; clothing - \$500; college tuition for the two emancipated children - \$834; transportation and auto maintenance - \$400; auto insurance for Husband and the two emancipated children - \$436.50; charitable and church contributions - \$800; vacation - \$500; and gifts - \$450.

Wife testified she was 42 years old. Wife is a Certified Nursing Assistant and also has an Associate of Science Degree. Wife worked from time to time during the marriage at Husband's dental practice. However, for the most part Wife quit working outside of the home once the parties were married. According to Wife, Husband discouraged her from working outside of the home because it would put them in a higher tax bracket. Wife testified that during the marriage, Husband would leave her cash ranging from \$60 to \$80 several times a week and would also deposit \$450 per week into a checking account for her discretionary use. After the parties separated, Wife secured a job with Colonial Hills Health Center as a CNA but was terminated for excessive absences. Wife then became employed at St. Mary's Holston Rehabilitation Center as a rehabilitation technician working approximately thirty hours per week and earning \$7.25 per hour. Wife stated she would work full-time if such a position became available. Wife also filed an affidavit of income and expenses. The affidavit included credit card bills Wife was paying and indicated that certain bills, such as life and health insurance, were being paid by Husband. According to the affidavit, Wife's monthly expenses totaled \$2,580 and her monthly income was \$1,927, which included the \$1,000

per month Husband was ordered to pay in temporary spousal support. Wife testified to having two affairs while married to Husband. Wife was planning on taking a test in order to enter the Blount LPN program but was unable to come up with the money to attend school. Wife stated that she would like to finish school. Wife claimed to have “back problems” which limits her ability to bend, lift, and squat.

After the trial was completed, the Trial Court issued an Opinion and Findings of Fact. After the original opinion was filed, both parties filed motions to alter or amend. Based on these motions, the Trial Court revised its initial rulings regarding the division of marital assets and payments of alimony to Wife. Although not issues in this appeal, both the original and revised opinions granted Husband a divorce based on Wife’s inappropriate marital conduct and designated Husband as the primary residential parent of the minor child. In both orders, Wife was directed to pay child support consistent with the guidelines after one year.

Concerning the division of marital assets, the Trial Court’s revised opinion ordered the parties to be designated as tenants in common for their real property located in North Carolina, which could be sold by agreement with the proceeds being divided equally. With regard to the marital residence, the Trial Court ordered that the residence was to become the sole property of Husband upon his payment to Wife of one-half of the equity in the house within a ninety day period.<sup>1</sup> The Trial Court valued the real property upon which Husband’s dental practice was located at \$53,000, and then stated:

Each party is entitled to one-half this value with husband having right to remain in possession by paying wife a reasonable rental or paying her one-half of the value thereof. This election shall be made within ninety days of entry of this order.... [T]he amount of monthly rental ... to wife shall be \$250.00 a month for sixty months ....

The Trial Court equally divided the following marital property: (1) dental office equipment; (2) dental office accounts; (3) funds in the checking account; (4) Locust Street Roth; (5) AmSouth account; (6) Husband’s IRA; (7) Wife’s IRA; and (8) the household furnishings not otherwise listed.<sup>2</sup> In addition to each party receiving one-half of these listed items, Husband received a 1990 Nissan Maxima, a boat, a 1986 Volvo, a 1986 Plymouth, certain coins, guns, and a watch. The collective value of these items as assigned by the Trial Court totaled \$6,450. Wife received a 1996 Ford Van, a china cabinet with dolls, and jewelry. The collective value of these items as

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<sup>1</sup>When the appeal was filed, Wife challenged the Trial Court’s judgment insofar as it awarded Husband discretion either to sell the marital residence with the proceeds divided equally or buy out her one-half interest. While this appeal was pending, Husband elected to purchase Wife’s one-half interest for \$67,500, an event which apparently was satisfactory to Wife. In light of this development, the parties announced at oral argument that this was no longer an issue.

<sup>2</sup> Although not entirely clear from the record, it appears the combined value of the IRA and Roth accounts exceeded \$122,000.

assigned by the Trial Court totaled \$20,600. After detailing the above marital property distribution, the Trial Court entered a judgment against Husband and in favor of Wife for \$14,500, which represented Wife's one-half interest in the dental office equipment, office accounts, and checking account.

Concerning alimony, the Trial Court's original opinion awarded Wife alimony in the amount of \$1,000 per month for a period of sixty months. The Trial Court's revised opinion reduced the duration of the alimony award, concluding that Wife was entitled to alimony only in the amount of \$1,000 per month for twelve months. The Trial Court declined to award Wife any attorney fees.

Wife appeals raising the following issues, which we quote:

1. Did the Trial Court err in its overall distribution of marital property between the parties?

2. Did the Trial Court err within its current specific distribution of property between the parties?

[a.] Did the Trial Court err in allowing Dr. Elrod to remain in possession of his marital dental practice property by paying wife a reasonable rental of \$250.00 per month for 60 months instead of ordering Dr. Elrod to buy out Deborah Elrod's interest in the property in a lump sum payment or in installment payments equal to her one-half of the value of the property?

[b.] Did the Trial Court err in awarding both parties one-half of the household residence furnishings to be agreed upon by the parties after inventory of the personal property in the former marital residence?

3. Did the Trial Court err in the amount and duration of spousal support awarded to [Wife] ... ?

4. Did the Trial Court err in failing to award [Wife] ... any funds to defray her attorney's fees incurred in the prosecution and defense of this cause?

### **Discussion**

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal

issues, our review is conducted “under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts.” *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

With regard to the Trial Court’s division of the marital assets, the many factors to be considered by a trial court in making an equitable distribution of property are set forth in Tenn. Code Ann. § 36-4-121(c), and include age, physical and mental health, vocational skills, employability, the contribution of a party to the marriage as homemaker, the contribution of each party to the acquisition or dissipation of marital or separate property, etc. The statute also provides that when awarding the marital residence and household effects, the trial court “*shall* give special consideration to a spouse having physical custody of a child or children of the marriage.” Tenn. Code Ann. §36-4-121(d) (emphasis added). A trial court has wide discretion in dividing the interest of the parties in marital property. *Barnhill v. Barnhill*, 826 S.W.2d 443, 449 (Tenn. Ct. App. 1991). As noted by this Court in *King v. King*, 986 S.W.2d 216, 219 (Tenn. Ct. App. 1998), when dividing marital property:

The trial court’s goal in every divorce case is to divide the parties’ marital estate in a just and equitable manner. The division of the estate is not rendered inequitable simply because it is not mathematically equal, *Cohen v. Cohen*, 937 S.W.2d 823, 832 (Tenn. 1996); *Ellis v. Ellis*, 748 S.W.2d 424, 427 (Tenn. 1988), or because each party did not receive a share of every item of marital property. *Brown v. Brown*, 913 S.W.2d [163] at 168. . . . In the final analysis, the justness of a particular division of the marital property and allocation of marital debt depends on its final results. *See Thompson v. Thompson*, 797 S.W.2d 599, 604 (Tenn. App. 1990).

First, we will discuss Wife’s claim that the Trial Court erred when, after awarding her a one-half interest in the real property upon which the dental practice is located, it then gave Husband the option of either buying out Wife’s one-half interest *or* paying her a reasonable rental value for a period of sixty months. With the real property being valued at \$53,000, if Husband were to elect to purchase Wife’s one-half interest, he would have to pay her \$26,500. However, if Husband were to elect to pay Wife the \$250 in monthly rental payments over sixty months instead of buying out her interest, Wife would receive a total of \$15,000 over a five year period and then apparently would have no interest in the property once the rental payments ceased. It goes without saying which option would be more appealing to Husband. It is important to note that neither party challenges the Trial Court’s judgment insofar as it: (1) divided this real property equally; (2) assigned a value to this property of \$53,000; or (3) concluded the reasonable rental value of the property for Wife’s one-half interest was \$250 per month. With this in mind, we believe the Trial Court’s final order should be modified. Specifically, on remand Husband shall buy out Wife’s one-half interest by payment to Wife of \$26,500, and he is given ninety (90) days from our judgment in which to do so. In the meantime, Husband shall continue to make rental payments of \$250 per month and shall be responsible for any accrued but unpaid rental payments since the date of the Trial Court’s judgment.

The next issue concerns Wife's claim that the Trial Court erred when it awarded both parties a one-half interest in the household furnishings valued at \$15,000 and thereafter instructed the parties to agree upon how to divide these furnishings. Essentially, Wife claims Husband should be ordered to buy out her one-half interest because the parties are unable to reach any agreements and she no longer has a need for the furnishings. After filing for divorce, Husband obtained a Restraining Order which prohibited Wife, among other things, "from coming about ... [Husband] either at the family residence or at his place of employment, from coming about the family residence, from interfering with [Husband's] possession of the marital residence, [or] from removing any property from the marital residence ...." Wife testified she was forced to move in with her mother because she was unable financially to afford her own place to live. After living with her mother for eight months, Wife was able to move into and eventually furnish a one bedroom apartment. Wife argues that she has not lived in the marital residence since January of 2001 and no longer needs any of the household furnishing. On the other hand, Husband argued to the Trial Court that since he was the primary residential parent he needed a "substantial amount of the household goods and furnishings for the benefit of the family." In our opinion, even if Wife wanted possession of one-half of the household furnishings, it is unlikely that the parties could reach any sort of an agreement on how to divide these assets. We believe Husband should be permitted to retain all of the household furnishings for the benefit of the family, as he suggests. On remand, Husband shall be given ninety (90) days from our judgment in which to pay Wife \$7,500, representing her one-half interest in the household furnishings.

The final issue with respect to the division of marital assets is Wife's claim that the overall property division is inequitable. After reviewing the record as a whole as well as the applicable statutory factors, we believe the Trial Court carefully considered the relevant factors when determining how to divide the marital assets. While the final property division does not have to be equal to be equitable, we note that the Trial Court's property division, and this is especially so after our modifications, results in a division that is close to 50-50. From the record before us, we cannot conclude the Trial Court abused its discretion when it divided the marital property or that this overall division is not just and equitable. Therefore, we affirm the Trial Court's division of marital assets as modified.

Next, we consider Wife's challenge to the alimony award. Determinations concerning the amount and duration of alimony are factually driven and require a balancing of the various factors contained in Tenn. Code Ann. § 36-5-101(d)(1). *Herrera v. Herrera*, 944 S.W.2d 379, 387-88 (Tenn. Ct. App. 1996). These factors include:

- (A) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (B) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and

the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;

(C) The duration of the marriage;

(D) The age and mental condition of each party;

(E) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;

(F) The extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage;

(G) The separate assets of each party, both real and personal, tangible and intangible;

(H) The provisions made with regard to the marital property as defined in § 36-4-121;

(I) The standard of living of the parties established during the marriage;

(J) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;

(K) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and

(L) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-101(d)(1).<sup>3</sup> Furthermore, while a trial court must consider all relevant statutory factors to determine if an economically disadvantaged spouse can be rehabilitated, the most important statutory factors are the disadvantaged spouse's need and the other spouse's ability to pay. *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001); *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn. 2002).

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<sup>3</sup>The version of Tenn. Code Ann § 36-5-101(d)(1) applied and cited above now has been amended, but this amendment is not applicable to this divorce.

In the present case, the Trial Court, unfortunately, did not state whether or not Wife could be rehabilitated and did not characterize the alimony award as rehabilitative alimony or alimony *in solido*, etc. On appeal, Husband appears to assume that the alimony was intended to be rehabilitative, arguing that Wife is “clearly capable of being rehabilitated” and the award of \$1,000 per month for twelve months was entirely appropriate. Wife argues that the award was “presumably *in solido* in nature as the Court made no mention of the payments being rehabilitative or modifiable in any way.” Wife further argues that she is entitled to an award of permanent alimony. Alternatively, Wife argues that if rehabilitative alimony or alimony *in solido* is appropriate, then the Trial Court’s initial award of \$1,000 per month for sixty months “should be the absolute baseline award and minimum alimony she could fairly receive under the facts of the case as bar ....”

In the recent case of *Robertson v. Robertson*, 76 S.W.3d 377 (Tenn. 2002), our Supreme Court stated the following with respect to rehabilitative alimony:

The marital standard of living is one of several factors enumerated by the legislature for consideration in awarding alimony. Tenn. Code Ann. § 36-5-101(d)(1)(I). We disagree, however, with the Court of Appeals' conclusion that this sole factor is the standard by which a court must determine whether an economically disadvantaged spouse can be rehabilitated. Instead, a trial court must consider every relevant factor in § 36-5-101(d)(1) to determine the nature and extent of support, which includes the decision to award rehabilitative alimony. The prior concept of alimony as lifelong support enabling the disadvantaged spouse to maintain the standard of living established during the marriage has been superseded by the legislature's establishment of a preference for rehabilitative alimony. See [*Crabtree*, 16 S.W.3d] at 359; *Self v. Self*, 861 S.W.2d 360, 361 (Tenn. 1993); see also *Blaine v. Blaine*, 336 Md. 49, 646 A.2d 413, 423 (1994). The parties' incomes and assets will not always be sufficient for them to achieve the same standard of living after divorce that they enjoyed during the marriage. See *Crabtree*, 16 S.W.3d at 359-60. However, rehabilitative alimony may assist the disadvantaged spouse in obtaining further education or training. See *Isbell v. Isbell*, 816 S.W.2d 735, 738-39 (Tenn. 1991); see also *In re Marriage of Grauer*, 478 N.W.2d 83, 85 (Iowa Ct. App. 1991) ("Rehabilitative alimony serves to support an economically dependent spouse 'through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting.'"). It may also provide temporary income to support the disadvantaged spouse during the post-divorce economic adjustment. See, e.g., *Crabtree*, 16 S.W.3d at 360-61.



All relevant factors, including those set out in § 36-5-101(d)(1), must be considered on a case-by-case basis to determine the nature and extent of support.

*Robertson*, 76 S.W.3d 340-41.

On appeal, Wife claims she simply cannot be rehabilitated “to the extent that she can be fully self-sufficient in any way resembling the standard of living the parties enjoyed during the marriage.” There is no doubt that Wife’s current standard of living is lower than that which she enjoyed while married to Husband. However, relative fault of the parties is a relevant consideration in making an award of alimony, and we note that had Wife not engaged in inappropriate marital conduct, there would be no need for her to establish a new and separate residence. We cannot and we do not consider Wife’s fault in a punitive aspect. Rather, we make this point simply because it is the reality of the situation. Husband’s standard of living likely will not be the same either. Husband paid Wife \$67,500 for her share of the equity in the marital residence and will be making other substantial cash payments to Wife. In addition, Husband is now the primary care-giver for the parties’ minor child. The point being, there is not enough combined income and assets between Husband and Wife sufficient for them to enjoy the same standard of living that existed prior to the divorce, as is often the case.

At the time of trial, Wife had secured gainful employment. She expressed her desire to secure full-time employment, which would obviously increase her total income. More importantly, Wife expressed her desire to complete her education, which would further increase her potential for earning a higher income. After considering all of the applicable factors set forth in Tenn. Code Ann. § 36-5-101(d)(1), including Wife’s need and Husband’s ability to pay, we believe this is an appropriate case for awarding rehabilitative alimony. We also believe the Trial Court’s initial award is what is necessary in order for Wife to be able to successfully rehabilitate herself. Accordingly, we reinstate the Trial Court’s initial award of alimony in the amount of \$1,000 per month for a period of sixty months. We classify this alimony as rehabilitative.<sup>4</sup>

The final issue is Wife’s claim that the Trial Court erred when it refused to award her attorney fees. As noted by this Court in *Yount v. Yount*, 91 S.W.3d 777 (Tenn. Ct. App. 2002):

[A]n award of such fees in a divorce case is considered to be a part of the alimony awarded. *Storey v. Storey*, 835 S.W.2d 593 (Tenn. Ct. App. 1992). As such, in determining whether to award attorney fees,

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<sup>4</sup> The amount and duration of alimony Wife should be awarded would not be different if we had concluded she was entitled to alimony *in solido* instead of rehabilitative alimony. See, e.g., *Blevins v. Blevins*, No. M2002-02583-COA-R3-CV, 2003 Tenn. App. LEXIS 923 (Tenn. Ct. App. Dec. 30, 2003) wherein the trial court awarded rehabilitative alimony in the amount of \$3,500 per month for sixty months. On appeal, this Court concluded the wife could not be rehabilitated but nevertheless left the amount and duration of the alimony award intact after reclassifying same as alimony *in solido*. Since the *Blevins* opinion is so recent, we note that the time in which to file a Rule 11 appeal in that case has not expired.

the trial court should consider all the relevant statutory factors, including the relative fault of the parties. *Lindsey v. Lindsey*, 976 S.W.2d 175 (Tenn. Ct. App. 1997). It is considered most appropriate where the final decree of divorce does not provide the obligee spouse with a source of funds, such as from property division or alimony in solido, with which to pay his or her attorney. *Houghland v. Houghland*, 844 S.W.2d 619 (Tenn. Ct. App. 1992). An award of attorney fees is considered to be within the sound discretion of the trial court, and will not be reversed on appeal if that discretion is not abused. *Garfinkel v. Garfinkel*, 945 S.W.2d 744 (Tenn. Ct. App. 1996).

*Yount*, 91 S.W.3d at 783. After considering all of the relevant factors, including the substantial amount of cash received by Wife, we cannot conclude that the Trial Court abused its discretion when it refused to award Wife her attorney fees. The judgment of the Trial Court on this issue is, therefore, affirmed. Likewise, after considering all relevant factors, we also decline to award Wife her attorney fees for this appeal.

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### **Conclusion**

The judgment of the Trial Court is affirmed as modified, and this cause is remanded to the Trial Court for such further proceedings as may be required, if any, consistent with this Opinion, and for collection of the costs below. The costs on appeal are assessed one-half against the Appellant, Deborah M. Elrod, and her surety, and one-half against the Appellee, James Robert Elrod.

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D. MICHAEL SWINEY, JUDGE